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ALERT

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Employers Beware!

Changes to the ADA May Expose You to Additional Enforcement Actions and Lawsuits

By Michael J. Lane and Bennett Pine

Employers beware. On January 1, 2009, the ADA Amendments Act of 2008 ("ADAAA") will create new challenges for employers as more employees will be considered "disabled." If employers do not take protective measures, these new changes could expose them to additional enforcement actions and lawsuits.

A Refresher on the Americans With Disabilities Act

First effective in 1992, the Americans with Disabilities Act ("ADA") had the stated purpose of "mainstreaming" approximately 43 million disabled individuals into the workforce. The ADA applies to employers with 15 or more employees. Under the ADA, individuals within the protected class are those:

1. who have a physical or mental impairment that substantially limits one or more "major life activities;"
2. with a record of impairment; and
3. who are "regarded as" having an impairment.

The employee must be "otherwise qualified" with respect to the job in issue, which means having the recited necessary credentials (e.g., a high school diploma, five years of experience, etc.) and being capable of performing the "essential functions" of the job. Where the individual would be able to perform the essential functions of the job if the employer provided a "reasonable accommodation," the employee is deemed "qualified."

If an employer fails to accommodate a disabled employee, the employee can initiate the EEOC complaint process. After the alleged discrimination occurs, an employee must file a complaint with the EEOC within 180 days. That time period is extended to 300 days in states which have their own anti-discrimination laws (e.g., New York). After the employee files his complaint, the EEOC allows the employer to respond with supporting evidence. The EEOC then may offer mediation, file suit on behalf of the employee, or provide the employee with a "right to sue" letter so that the employee may pursue his claim in court. Should an employer be found liable for discrimination, the EEOC may require the employer to provide

ANDERSON KILL & OLICK, P.C.
1251 Avenue of the Americas
New York, NY 10020
(212) 278-1000 Fax: (212) 278-1733

ANDERSON KILL & OLICK, P.C.
Two Sound View Drive, Suite 100
Greenwich, CT 06830
(203) 622-7668 Fax: (203) 622-0321

ANDERSON KILL & OLICK, P.C.
One Gateway Center, Suite 1510
Newark, NJ 07102
(973) 642-5858 Fax: (973) 621-6361

ANDERSON KILL & OLICK, P.C.
1600 Market Street, Suite 2500
Philadelphia, PA 19103
(215) 568-4202 Fax: (215) 568-4573

ANDERSON KILL & OLICK, L.L.P.
2100 M Street, N.W., Suite 650
Washington, DC 20037
(202) 416-6500 Fax: (202) 416-6555

www.andersonkill.com

who's who

Michael J. Lane is a shareholder in the New York office of Anderson Kill and is chair of the corporate & commercial litigation group. Mr. Lane has had over twenty years of experience as a civil litigator. He has tried cases, argued appeals, and represented clients in a wide range of subject matters including commercial, employment, securities, accountant malpractice defense, insurance, real estate, and tax law.
(212) 278-1568
mlane@andersonkill.com

Bennett Pine is a shareholder in Anderson Kill's New York and Newark office and is chair of the firm's employment & labor group. Mr. Pine has broad-based labor and employment law experience and regularly plays a "hands-on" role offering "preventative maintenance" advice and counseling to employers in the full range of legal issues affecting the workplace.
NY: (212) 278-1288
Newark: (973) 642-5006
bpine@andersonkill.com

*__Carrie Maylor__ and __Jane Horne__, associates in the New York office of Anderson Kill, who are pending admission to the New York bar, contributed to this article.

Anderson Kill & Olick, P.C. is a national law firm with offices in New York, Greenwich, Newark, Philadelphia and Washington, DC that regularly represents policyholders in insurance matters.

the disabled employee with back pay, compensatory damages, attorneys' fees, punitive damages, front pay, and injunctive relief.

The ADAAA

The ADAAA, signed into law in September 2008, rejects a series of prior United States Supreme Court decisions which were considered by many observers to unduly limit the conditions that qualified as "disabilities," and, as a result, left too many individuals outside of the ADA's protection. The changes the ADAAA specified likely will result in increased employee requests for disability-based accommodations and, consequently, more disability claims. Employers, however, can minimize exposure to liability by developing effective strategies for responding to accommodation requests and defending against potential discrimination claims.

The ADAAA retains the ADA's basic definition of "disability" as:

1. an impairment that substantially limits one or more major life activities;
2. a record of such an impairment; or
3. being regarded as having such an impairment.

An employer's obligation also remains the same — to reasonably accommodate "otherwise qualified" employees or job applicants with a known disability if the accommodation would not impose an "undue hardship" on the operation of the employee's business. However, the ADAAA changes the way the above terms will be interpreted.

Perhaps most significantly, the ADAAA broadens the scope of who comes under the law's protections. It rejects the term "substantially limits" as defined by the Supreme Court and EEOC. It expands the definition of "major life activities" by illustrating two non-exhaustive lists of functions that come within the term's definition. The first list includes major life activities that the EEOC previously had not recognized, such as reading, bending, and communicating. The second list contains major bodily functions, such as immune system, digestive, bladder, neurological, respiratory, circulatory, endocrine, reproductive, bowel, and brain functions.

The ADAAA, reversing the Supreme Court's rulings in the "Sutton trilogy"[1]:

1. makes clear that mitigating measures (other than ordinary eyeglasses or contact lenses) cannot be considered in determining whether an individual has a disability; and
2. expressly states that an impairment can be a disability even if it is episodic or in remission.

For employers, this means that a determination of whether an impairment substantially limits a major life activity must be made without regard to the ameliorative effects of mitigating measures such

as medication, medical supplies, or prosthetics. Previously, for example, an employee with a serious heart condition who used medication to control it, could very well be unprotected by the ADA.

Further, under the ADAAA, if an employer makes an employment decision (e.g., termination) based on an employee's actual or perceived impairment (one which is not transitory and minor), the employer has regarded the employee as having the disability and therefore must defend its actions. However, employees who are merely "regarded as" disabled are not entitled to a reasonable accommodation.

Steps Employers Should Take

Since more employees than ever will be deemed "disabled," employers will surely find themselves fielding more requests for accommodations. With increased requests invariably will come additional claims under the ADA. There are, however, several steps that employers may take to protect themselves against unwanted legal action.

First, employers must document all interaction with the disabled employee when a request for an accommodation is made. An employer should always record:

1. the accommodation the employee requests and the reason for the request;
2. other potential accommodations that may be made which differ from what the employee requested;
3. all of the accommodations that are discussed and their pros and cons; and
4. which accommodation was chosen and why.

Note, however, that the employer need not provide the employee with the specific accommodation requested nor with the "best," most expensive, or most "technologically sophisticated" accommodation. Rather, an employer is free to choose any available accommodation which is "effective."

Second, employers must train their supervisors who will engage in the "interactive process"with disabled employees. This includes teaching supervisors how to handle requests for an accommodation, informing supervisors of the expanded definition of "disability" under the new ADAAA, discussing accommodations that are available at the work place, and cautioning supervisors to expect more requests and the possibility of lawsuits.

Third, employers must ensure that their own policies comport with the amended laws. This includes consulting internal or outside counsel to revise polices and handbooks and discussing with counsel potential problems before they grow into lawsuits. Employers also must inform all employees about their dispute resolution policies and apply such policies uniformly.

What is a Reasonable Accommodation?

The ADAAA has not changed an employer's obligation to provide reasonable and "effective" accommodation to disabled employees, nor has it changed the types of accommodations that may be offered. This means that employers still must give disabled individuals the same opportunities as non-disabled employees, as if the employees were working from an even playing field. Some examples of reasonable accommodations that employers can make for a disabled employee include:

1. reassigning or assisting the employee with non-essential job functions;
2. reassigning the employee to a vacant position;
3. restructuring the employee's job;
4. offering time off in the form of unpaid leave;
5. work area adjustments; and
6. offering the employee assistive devices.

When has an employer accommodated enough? The general rule is that an accommodation need not be too unreasonable, too difficult, or too expensive. An employer is not required to remove an essential job function, lower production standards, or excuse violations of conduct — even when the impairment caused the violation. It also must be remembered that once an employer has provided such an accommodation, it may hold the disabled employee to the same performance and attendance standards as other employees.

How to Defend Against Claims Arising After the ADAAA

Because the ADAAA has widened the definition of "disability," it is less likely that there will be a threshold inquiry whether an employee is disabled. Now the emphasis will be on issues of liability — that is whether the employer reasonably accommodated the employee's condition and whether the employee clearly articulated what she needed.

Bear in mind that under the ADAAA, the elements of a claim of failing to accommodate remain the same. These elements are:

1. the employee suffers from a "disability;"
2. the employer had notice of the disability;
3. the employee could perform essential functions of her job with a reasonable accommodation;
4. the employer refused to make a reasonable accommodation; and
5. the employer cannot establish that an accommodation posed an undue hardship.

Fortunately, the law does not require employers to be "clairvoyant." The employee must indicate that he needs a change in the nature of his employment due to a disability, although the employee need not formulate his request in any specific way. Thus, it is recommended that employers specify to whom requests for accommodation should be made, and train appropriate personnel to initiate the interactive process.

Making a Good Faith Effort to Accommodate

When faced with a potential claim, there are several ways that employers can establish that it has made a good faith effort to accommodate a disabled employee. One option is making facilities readily accessible to disabled employees. Another is job restructuring, e.g., providing part-time or modified schedules to employees. Third, employers may assign a disabled employee to an open position. Finally, employers can acquire equipment, devices, readers, or interpreters to place the disabled employee on an equal footing with other employees.

Most importantly, the employer can make a good faith effort to accommodate by engaging in dialogue with the employee. Through this "interactive process" the employer should pinpoint the employee's restrictions and explore all options for accommodation. The employer need not provide an employee's preferred accommodation, but it must document the reasons why it rejected the preferred accommodation. Finally, the employer should clearly state the length or limitations of the accommodation.

Undue Hardship

The ADAAA has not changed the law surrounding undue hardship. Factors that are considered in determining whether an accommodation would inflict undue hardship include:

1. the nature or cost of accommodation;
2. the composition, structure, and functions of the employer's workforce;
3. the employer's type of business; and
4. the impact of accommodation on business operations.

Litigation Strategies

Traditionally, the use of experts in ADA--related litigation has focused on "threshold" issues. This includes the evaluation of questions concerning the employee's medical condition, whether that condition substantially limits one of the major life activities, and whether the employee can perform the essential functions of his job. With the ADAAA, the focus of expert use will shift to proving reasonable accommodation and undue hardship. Experts can be used to show the reasonableness of alternative accommodations — accommodations other than those preferred by the employee. Experts also may be employed, albeit rarely, to prove undue hardship in modifying work facilities or acquiring certain equipment to accommodate the disabled employee.

There also are a few discovery issues that employers should consider when embarking upon ADA-related litigation. The first is determining at what point during the litigation an employer can request a physical or mental examination of a plaintiff employee. Rule 35 of the Federal Rule of Civil Procedure permits the physical or mental examination of a plaintiff if the plaintiff's physical or mental condition is "in controversy." However, the plaintiff's filing of a law suit under the ADA may not be enough to meet this requirement. Employers should take notice that a plaintiff employee may not be required to oblige the employer's post-employment request for an exam simply because a lawsuit has been filed.

Videotaped depositions may be helpful to the employer in proving that the employee can or cannot perform the essential functions of her job.

Finally, the ADAAA is likely to affect which issues are eligible for decision on summary judgment. For example, employers should be prepared to address the reasonableness of its accommoda-

tion for a disabled employee on summary judgment, instead of whether an employee is disabled.

Everyday Strategies to Prevent Litigation

Other non-litigation-based defense strategies include updating job descriptions and training managers to handle accommodation requests appropriately. Employers should be certain that job descriptions clearly state all essential job functions. Employers also should ensure that the essential job functions listed on a job description truly are "essential" to that position.

Final Thoughts

In sum, in light of the ADAAA, increased requests for disability-based accommodations and disability claims loom. Employers should aim to avoid EEOC litigation by properly training their employee supervisors, using the interactive process to their benefit, documenting the process as much as possible, and consulting legal counsel promptly if they have any questions or if they suspect potential problems. As the eve of the ADAAA's implementation approaches, it is imperative for employers to take measures now to prevent, or at least minimize, potential claims.

[1]Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999). In Sutton, as well as two companion cases (collectively referred to as the "Sutton trilogy"), the Supreme Court held that the determination of whether a worker is disabled within the meaning of the ADA must take into account""mitigating measures."